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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. **RECEIVED**

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JUN 1 1994

In the Matter of)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act)
Competitive Bidding)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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EX PARTE COMMENTS OF PLUSCOM, INC.

PlusCom, Inc. ("PlusCom"), by its attorneys and pursuant to Sections 1.1206(a)(1) and (3) of the Commission's Rules, hereby submits ex parte comments in the captioned docket.^{1/} PlusCom files these ex parte comments to answer questions and make recommendations arising out of May 31, 1994 ex parte meetings between PlusCom and Commissioner Susan Ness, Commissioner Rachelle Chong, and Donald Gips, Deputy Chief, Office of Plans and Policy. In these meetings, PlusCom discussed its views that the Commission should adopt a set-aside of broadband PCS spectrum for the bidding purposes of small businesses, businesses owned by women, business owned by minorities, and rural telephone companies (the "Designated Entity")

^{1/} Notice of Proposed Rulemaking, 8 FCC Rcd 7635 (1993) ("NPRM"); Second Report and Order, PP Docket No. 93-253, FCC 94-61 (April 20, 1994) ("Second Report and Order"). It is likely the Commission will adopt specific rules for broadband PCS auctions, the subject of these ex parte comments, at the its open meeting on June 9, 1994.

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applicants). The Ex Parte memo letter filed with the Secretary on May 31, 1994, summarizes PlusCom's arguments as to why set-asides are necessary to fulfill the Congressional mandate to ensure economic opportunity for Designated Entity applicants, 47 U.S.C. § 309(j)(4)(D), and is incorporated herein by reference.

A primary concern arising from the May 31, 1994 meetings was the Constitutionality of a set-aside program for Designated Entities, as applied to race and gender preferences. Supreme Court decisions on the issue of numerical set-asides turn on their facts,^{2/} and Court decisions regarding race and gender preferences for FCC mass media licenses turn on the issue of diversity of broadcast voices,^{3/} basically inapplicable in the context of commercial mobile radio services such as PCS. The

2/ Compare Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (unconstitutional for city to set aside 30% of public works money for minorities -- no proven discrimination) and Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (struck down race as only preference criteria for state university admission decisions) with Paradise v. United States, 480 U.S. 149 (1987) (Court fashioned set-aside remedy for proven discrimination in police hiring and promotion) and Fullilove v. Klutznick, 448 U.S. 448 (1980) (Constitutional for Congress to set aside 10% of Federal public works money for minorities).

3/ Compare Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (upholding race-based preference in broadcast license comparative hearings) with Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992) (opinion of Thomas, C.J.) (striking down gender-based preference in broadcast license comparative hearings).

Commission has understandably struggled with these issues throughout this proceeding.^{4/}

The NPRM provides the Commission's solution: "Measures adopted for the other enumerated entities . . . could be reviewed under a more deferential judicial standard. FCC v. Beach Communications, Inc. [113 S. Ct. 2096] (1993). . . . [C]ommenters should address whether we could satisfy the congressional objective simply by affording preferences to small businesses"

PlusCom suggests that the Commission can sidestep this Constitutional quandary by adopting a set-aside program allowing bidding from only "small businesses." PlusCom is aware of the Commission's general determination to define "small businesses" in accordance with the Small Business Association's ("SBA") definition.^{5/} However, PlusCom requests that the Commission exercise its discretion and adjust the threshold upward for broadband PCS, one of the most capital intensive services to be auctioned. Indeed, broadband PCS, with entities such as Tier 1 Local Exchange Carriers, Interexchange Carriers, and large cable companies expected to bid many millions of dollars, is the epitome telecommunication industry where the SBA standard is clearly "not high enough to encompass those entities that require

4/ NPRM, 8 FCC Rcd at 7645-46 ¶¶ 72-74; Second Report and Order at ¶¶ 289-297.

5/ Second Report and Order at ¶¶ 267, 271 (net worth of \$6 million with average net income after Federal income taxes for the two preceding years not in excess of \$2 million).

the benefits."^{6/} Therefore, PlusCom supports a proposal currently under consideration by the PCS Task Force that, to meet Congressional intent of maintaining opportunities for small businesses, the Commission allow businesses with annual revenues of less than \$100 million to bid for set-aside broadband PCS spectrum.

If the Commission revises its allocation to three 30 MHz frequency blocks and three 10 MHz blocks,^{7/} it should set-aside one of the 30 MHz blocks for small business applicants as described above, to be auctioned on a Basic Trading Area ("BTA") basis.^{8/} A division by BTA will be much more manageable for small businesses from both an auction and a build-out and management perspective. PlusCom would find it much easier to bid on and develop an aggregate of BTAs rather than one or two Major Trading Areas ("MTAs").

It would also make sense to conduct the set-aside auction subsequent to the auction for the other two 30 MHz blocks. Conducting the set-aside auction second would allow those large companies who were unable to obtain the markets they desired in the first auction to take a minority position in a small business consortium. This would result in a win-win situation, where the small business consortium

6/ Id. at ¶ 271.

7/ See "FCC Considering Major Change in PCS Spectrum Allocation," Communications Daily, May 31, 1994, at 2.

8/ If the Commission retains its original plan for two 30 MHz blocks, one 20 MHz block and four 10 MHz blocks, PlusCom would support the set aside of the 20 MHz block and one 10 MHz block.

would have a source of financing, and the large company would have access to the spectrum it desires.

A small business entity set-aside would clearly pass Constitutional muster, since the basis for the set-aside would be economic, not based on a suspect classification such as race or gender.^{9/} Furthermore, no fundamental right is implicated in the bidding for PCS licenses. Therefore, the set-aside as discussed herein need only meet a rational basis test of Constitutionality.^{10/} Congress explicitly articulated its rationale supporting small business classifications by stating "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries."^{11/} This is all the

^{9/} For example, it has long been known that "wealth" or "poverty" is not a suspect classification under equal protection analysis. See Harris v. McRae, 448 U.S. 297, 323 (1980) ("this Court has held repeatedly that poverty, standing alone is not a suspect classification"); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 29 (1973) (the Court has never held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny).

^{10/} "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993) (and cases cited therein).

^{11/} H.R. Rep. No. 111, 103d Cong., 1st Sess. 254-55 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 581-82.

rational basis the Commission needs to proceed with set-asides of broadband PCS spectrum for small businesses as defined above.^{12/} By fashioning the set-aside in terms of a preference for an economic category, the FCC avoids the need to justify them under the equal protection - affirmative action rubric.^{13/}

To further fulfill Congressional intent, PlusCom proposes that, within the bidding structure of the small business set-asides, the Commission allow a further bidding credit of ten percent (10%) for businesses owned by minorities and businesses owned by women. Congress has affirmatively stated that, despite the fact that diversity of viewpoints is irrelevant to the licenses issued pursuant to competitive bidding, "the Commission should adopt regulations . . . to ensure that businesses owned by members of minority groups and women are not in any way excluded

^{12/} Indeed, the Commission itself noted that "set-asides may be necessary to accomplish the statutory objectives of section 309(j)(4)(D)." Second Report and Order at ¶ 247.


^{13/} The Commission also need not concern itself with the D.C. Circuit's recent decision regarding the "integration preference" in broadcast licensing comparative hearings. See Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). Bechtel was an administrative law case, not Constitutional law. The policy in question in Bechtel, whereby the Commission gave preferences to applicants who proposed to "integrate" ownership and management, was fashioned by the Commission, not Congress. The Court struck down the policy as unsubstantiated, arbitrary and capricious under the Administrative Procedure Act. Bechtel has no application here, where Congress has provided a substantial rationale for the Commission's policy determinations, and therefore, the Commission's actions could not be struck down as arbitrary or capricious.

from the competitive bidding process."^{14/} Providing such a preference would be consistent with the approach taken in the narrowband PCS and IVDS auctions.^{15/}

WHEREFORE, for the above stated reasons, PlusCom respectfully urges the Commission to adopt its regulations regarding the competitive bidding of broadband PCS licenses in accordance with the above proposals.

Respectfully submitted,

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Dated: June 1, 1994

^{14/} H.R. Rep. No. 111 at 255, reprinted in 1993 U.S.C.C.A.N. at 582.

^{15/} See Third Report and Order, PP Docket No. 93-253, FCC 94-98, at ¶¶ 72-79 (May 10, 1994); Fourth Report and Order, PP Docket No. 93-253, FCC 94-99, at ¶¶ 39-46 (May 10, 1994).

CERTIFICATE OF SERVICE

I, Marionetta Holmes, a secretary to the law firm of FISHER WAYLAND COOPER LEADER & ZARAGOZA L.L.P., hereby certify that on this 1st day of June, 1994, I served a true copy of the foregoing "EX PARTE COMMENTS" by hand delivery, upon the following:

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